United Nations A/C.6/73/SR.23

General Assembly
Seventy-third session

Official Records

Distr.: General
14 November 2018

Original: English

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Wednesday, 24 October 2018, at 3 p.m.

Chair: Mr. Luna (Vice-Chair) ..... (Brazil)

Contents

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (*continued*)

This record is subject to correction.

Corrections should be sent as soon as possible, under the signature of a member of the delegation concerned, to the Chief of the Documents Management Section (dms@un.org), and incorporated in a copy of the record.

Corrected records will be reissued electronically on the Official Document System of the United Nations (http://documents.un.org/).

18-17735 (E)

Please recycle

In the absence of Mr. Biang (Gabon), Mr. Luna (Brazil), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (A/73/10) (*continued*)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V, XII and XIII of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2. **Ms. de Wet** (South Africa) said that while the Commission's seventieth anniversary commemorative events had offered an opportunity to reflect on its achievements in the progressive development and codification of international law, it was disappointing that, after 70 years in existence, the Commission still lacked gender representativeness, with only 7 women out of a membership of 34.

3. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", South Africa welcomed the clarity that the Commission had provided in its draft conclusions, although the Vienna Convention on the Law of Treaties remained the primary source of the rules of treaty interpretation.

4. The general rule and means of treaty interpretation as set out in article 31, paragraph 1, of the Vienna Convention, pursuant to which a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, remained paramount. The draft conclusions were not new or competing rules, but a useful tool in enhancing understanding of article 31, paragraph 3 (a) and (b). Subsequent agreements and subsequent practice should not be seen as a means of amending treaties through interpretation. A treaty should be amended or modified only using the procedure prescribed by the treaty itself, or in accordance with the rules of customary law on treaty amendment.

5. Insofar as the Commission failed to distinguish between interpretation and modification or amendment in the commentaries to the draft articles, it was important to specify that a treaty could only be amended or modified in accordance with the clearly and deliberately expressed agreement of the parties. That was not only a matter of respect for parties' sovereignty, but was also critical for the legitimacy of treaties and the stability of the international legal order. Whenever there were two possible interpretations of a treaty, a reasonable interpretation according to the general rule set out in article 31, paragraph 1, should always be preferred.

6. Turning to the topic "Identification of customary international law", she said that the identification of customary international law was an important source of public international law, notwithstanding the existence of a plethora of treaties, which had only increased in scope and volume in recent times. The 16 draft conclusions adopted on the topic on second reading provided a useful guide for legal practitioners in the area of public international law.

7. South Africa concurred with the two-element approach for determining the existence and content of rules of customary international law and welcomed the holistic approach that the Special Rapporteur had proposed. The increasing recourse that national courts had to matters containing elements of international law showed that the draft conclusions were not for the exclusive preserve of academia: they had meaning and application in real-life settings. That augured well for the progressive development of customary international law.

8. The topic was particularly important for South Africa, because its courts had recently grappled with cases with an international law dimension. In accordance with the Constitution of South Africa, customary international law constituted national law, unless it was inconsistent with the Constitution or an Act of Parliament. Her delegation also welcomed the non-prescriptive nature of the draft conclusions, which reflected the approach that States, international organizations and international courts had adopted over time.

9. The draft conclusions reflected the reality that States were the primary actors in the formation of customary international law, although they also included the recognition that in certain cases, international organizations could also contribute to the formation of customary international law. The examples provided in the commentaries were by no means exhaustive, but showed that international organizations increasingly exercised public powers on behalf of States.

10. In paragraph 3 of draft conclusion 4, the Commission did not recognize the conduct of non-State actors as expressions of customary international law. In its commentaries, it noted, however, that the conduct of those actors might have an indirect role in the identification of customary international law. Her delegation looked forward to hearing the views of other delegations on that issue, a discussion of which was long overdue.

11. Similarly, State practice was defined in draft conclusion 5 as encompassing the conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions. The conduct of any organ of a State was deemed to be the conduct of the State as a whole, irrespective of whether the conduct was that of a provincial, local or central government official. As indicated in the commentary, the manner in which a State treated its own nationals might also relate to matters of international law. The experiences of other States with regard to draft conclusion 5 would be instructive.

12. In respect of draft conclusion 8 (The practice must be general), it was her delegation's view that military and economic power were irrelevant in determining whether a State was "specially affected". A more nuanced approach should be taken in terms of the concerns expressed.

13. Her delegation welcomed the inclusion of draft conclusion 15 (Persistent objector). The temporal nature of the objection was imperative, and its invocation should be subject to stringent requirements.

14. Her delegation remained concerned about the scarcity of international law resources from all jurisdictions. It therefore agreed with the Secretariat that yearbooks of international law detailing State practice and national treaty collections were critical bibliographic resources.

15. With regard to the decision to include the topic "Sea-level rise in relation to international law" in the Commission's long-term programme of work, the Intergovernmental Panel on Climate Change had recently released a report indicating that global warming would continue to cause long-term changes, including sea-level rise. That would have consequences for the international law framework. Despite the concerns raised in relation to whether State practice was at a sufficiently advanced stage to warrant progressive development and codification of the law on the topic, her delegation felt that it was time to deal with the legal questions surrounding sea-level rise.

16. **Mr. Oña Garcés** (Ecuador) said that, for his country, encouraging the progressive development of international law and its codification, as called for in Article 13 of the Charter of the United Nations, was a priority for ensuring full compliance with the purposes and principles of the Organization and bringing international law into line with advances in legal science and changes in society.

17. Ecuador took note of the set of draft conclusions adopted by the Commission on second reading on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which would serve as a means of interpreting the general rule enunciated in article 31 of the Vienna Convention. It also welcomed the set of draft conclusions on identification of customary international law, which aimed to establish a legal methodology for identifying rules of customary international law in specific cases. It was worth noting that the Commission had developed commentaries which were to be read together with the draft conclusions, with both serving as a guide for determining the existence and content of rules of customary international law, which required the presence of two constituent elements: general practice and *opinio juris*. That methodology would be very useful for legal practitioners, and in particular national judges, who were often called upon to identify the existence of rules of customary international law in cases submitted to them. Ecuador endorsed the Commission's recommendations in respect of both topics.

18. His delegation welcomed the Commission's decision to include the topic "General principles of law" in its programme of work and for appointing Mr. Vázquez-Bermúdez as Special Rapporteur for the topic. It also welcomed the decision to include the topics "Universal criminal jurisdiction" and "Sea-level rise in relation to international law" in its long-term programme of work.

19. His Government was pleased that the Commission had held its first part-session in New York, which had enabled the members of the Committee to participate in the Commission's discussions and thus enhance interactions between the two bodies.

20. **Mr. Eidelman** (Israel) said, in relation to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", that treaties were concluded, inter alia, for the purpose of stability and clarity. That was reflected in certain articles of treaties, such as provisions regarding amendments and modifications, which allowed for changes to be made to a treaty, but only in accordance with a specific, previously agreed procedure. A mechanism or arrangement that affected the interpretation of the provisions of a treaty created subsequently to a treaty's entry into force and which did not include all the States parties to that treaty undermined that very purpose. It was therefore important for States to retain their discretion as to whether to accept a certain agreement or practice that would affect their obligations under a treaty or the interpretation of its provisions. Subsequent agreements and subsequent practice should be binding

only upon those States that had actively and unequivocally agreed to them.

21. On the topic "Identification of customary international law", Israel appreciated the Commission's insistence on the need for State practice and corresponding *opinio juris* for customary international law to emerge. Most importantly, the emphasis in the updated version of the draft conclusions and the commentaries thereto on the primacy of States in the establishment of customary international law was essential.

22. Israel welcomed the point made in paragraph (4) of the commentary to draft conclusion 8 that the practice and *opinio juris* of specially affected States that were particularly involved in the relevant activity or were most likely to be concerned with the alleged rule were indispensable in assessing generality of practice. It endorsed the legal precision of the Commission on those issues, which better reflected the current state of the law than the previous version of the draft conclusions and the commentaries thereto.

23. At the same time, Israel had a number of reservations. As a general comment, the draft conclusions and the commentaries thereto should reflect broad agreement between States so as to achieve broad acceptance. That could only be attained by reflecting well-established principles concerning the identification of customary international law. However, it was unclear whether some of the draft conclusions and the commentaries thereto purported to codify existing law or proposed its progressive development. One example was the overly broad role assigned in the commentaries to international organizations in the formation or expression of a customary rule. That approach did not reflect the current state of law. In his delegation's view, the role of international organizations in the identification of customary international law should be limited, depending on whether a matter pertained to the internal functioning of the international organization or its relations with States, or whether States had explicitly transferred exclusive competence on the matter to the international organization.

24. A clarification should have been included in the text of the draft conclusions stating that inaction could be taken into account as practice only when it was deliberate. The Commission should also have gone into more detail in the commentary, to explain that the deliberate inaction referred to must stem from a sense of customary legal obligation and not from diplomatic, political, strategic or other non-legal considerations which, while deliberate, did not contribute to the emergence of customary international law. For that reason, as well, Israel had serious reservations about the statement in paragraph (8) of the commentary to draft conclusion 10 that *opinio juris* could be deduced from a State's silence "where the practice is one that affects — usually unfavourably — the interests or rights of the State failing or refusing to act". Only express evidence to support the State's reasoning for refraining from acting, or its silence, out of a sense of customary legal obligation, could indicate the existence of a negative practice or an *opinio juris*.

25. The Commission's assertion that temporary acts which were not final, definitive and conclusive, such as draft legislation or decisions of lower courts still subject to appeal, could constitute evidence for State practice was incorrect and might lead to great uncertainty and contradictory outcomes.

26. Israel was also concerned about the relatively central role accorded by the Commission to treaties that were not yet in force or which had yet to obtain widespread participation. Given the increase in the total number of treaties and the tendency to require only a minimal number of ratifications for a treaty to enter into force, any reliance on such treaties for the identification of customary international law had little or no value.

27. Israel reiterated its concern in respect of the passages in the draft conclusions and the commentaries thereto on the question of persistent objection to a rule of customary international law. It would have been appropriate to include clear criteria not only for persistent objection, but also for its retraction. It should also have been specified in the draft conclusions that an objection clearly expressed by a State during the formation of a customary rule was sufficient to establish that objection and did not generally need to be repeated to remain in effect.

28. On the Commission's recommendation that the General Assembly take note of the draft conclusions, Israel drew attention to the non-legally binding nature of General Assembly resolutions.

29. The draft conclusions and the commentaries thereto should have been revised further in order to accurately reflect current international law. If the draft conclusions were relied on in the future, it should be borne in mind that they represented an outcome of the Commission's work and not an expression of the views of Member States. In that respect, it would also be critical to refer not only to the text of the draft conclusions but also to the commentaries and States' observations as submitted to the Commission and as reflected in statements made in the Sixth Committee and elsewhere.

30. His delegation's non-exhaustive comments and observations on the topic to the Commission would be made available on the Committee's PaperSmart portal.

31. Israel had reservations about the Commission's decision to include the topic of universal criminal jurisdiction in its long-term programme of work. Its concerns were three-fold: the significant challenge of identifying State practice on the topic when only a small portion of the overall legal data was publicly available, which could lead to a distorted picture of State practice and would serve as a poor basis for proper legal analysis; the fact that the Commission was currently dealing with three other closely linked topics, which should be finalized before considering the complex topic of universal criminal jurisdiction; and, and above all, the obvious sensitivity of the topic, as all too often universal jurisdiction was used primarily to advance a political agenda or to attract media attention, rather than to genuinely promote the rule of law.

32. Israel welcomed the Commission's decision to include the topic "Sea-level rise in relation to international law" in its long-term programme of work. Sea-level rise posed a concrete threat, especially to coastal areas and low-lying coastal countries, and the international community should make efforts to prepare for and adapt to the potential implications of that development. Israel encouraged the examination of the legal aspects of sea-level rise and related issues, including maritime law, statehood and the protection of persons affected. As the topic was relatively new, it would be useful to map out the key legal questions arising from it and the considerations to be taken into account. However, it would be prudent to address each issue according to the legal framework applicable to it, rather than adopt an integrative approach. As noted in the proposed syllabus, any output of the Study Group established to examine the issue should be based on the application of existing principles of customary international law, rather than the development of new legal principles or the modification of existing international law.

33. **Mr. Sarufa** (Papua New Guinea) said that his delegation was particularly pleased that the Commission had decided to include the topic of sea-level rise in relation to international law in its long-term programme of work. While it might seem like a new topic for the Commission, for his delegation, that subject had been a serious concern for some time, especially in the context of climate change, sea-level rise and maritime boundaries. Mindful of the increasing existential threats facing its low-lying islands and coastal communities from rising sea-levels and bearing in mind the gaps in the United Nations Convention on the Law of the Sea and other rules of international law regarding sea-level rise, Papua New Guinea called on the Commission to address those issues without delay. It strongly agreed with the Commission's determination that the topic met all the criteria for inclusion in the long-term programme of work. It also supported the establishment of a study group and the adoption of the analytical approach as the method of work on the topic. Indeed, his delegation strongly supported moving the topic to the Commission's current programme of work. It also welcomed the dialogue with four members of the Commission held on 23 October 2018 as part of the side event jointly organized by the Alliance of Small Island States, New Zealand and Peru on the topic and encouraged such important constructive engagement.

34. While the scope of the work would be limited to only the legal implications of sea-level rise with respect to three principal areas, namely the law of the sea, statehood and protection of persons affected by sea-level rise, for Papua New Guinea, as a maritime and archipelagic State, that was a monumental step in the right direction. The topic was also important for securing maritime boundaries for archipelagic States. In that connection, his delegation was currently in the final phase of submitting the country's new maritime boundaries delimitation charts and coordinates to the Secretary-General.

35. Article 47 of the United Nations Convention on the Law of the Sea contained specific rules on archipelagic baselines, including a water-to-land area ratio requirement and a limitation on baseline segment lengths. The loss of outlying small islands or drying reefs due to sea-level rise could affect the status of those baselines and consequently the maritime zones of archipelagic States. Sea-level rise could also have an impact on low-tide elevations under the Convention. Those important issues needed to be examined through an in-depth analysis of existing international law, including treaty and customary international law, in accordance with the Commission's mandate. Such an analysis should include determining the degree to which current international law was able or unable to respond to those issues, and the need for States to develop practicable solutions.

36. As only States could generate maritime zones, it was essential for island States to maintain statehood in order to preserve their maritime zones. Thus, statehood was a threshold issue that was interrelated with questions regarding maritime zones. Statehood raised a potential issue of statelessness, including de facto statelessness. The principle of prevention of statelessness in international law was a corollary to the right to a nationality, and reference should be made to

the 1961 Convention on the Reduction of Statelessness as one of the legal instruments to be considered by the Commission. Considering that the topic would have implications for human migration and the status of refugees, the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees should also be among the legal instruments considered by the Commission.

37. **Ms. Zolotarova** (Ukraine) said that her delegation welcomed the adoption on second reading of the set of draft conclusions and commentaries thereto on the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Identification of customary international law". It took note of the suggestion to include the topics "Universal criminal jurisdiction" and "Sea-level rise in relation to international law" in the Commission's long-term programme of work.

38. The weakness of the existing legal framework relating to environmental protection in areas affected by armed conflicts had exacerbated the problems related to protection of the environment in situations of occupation and was one of the reasons behind her Government's initiative to sponsor a resolution on the subject at the second session of the United Nations Environment Assembly held in 2016. Ukraine had also sponsored the draft resolution on pollution mitigation and control in areas affected by armed conflict or terrorism submitted by Iraq at the Assembly's third session in 2017. It was high time for the Commission to address those questions. Recent developments showed that protecting the environment in relation to armed conflict was not a hypothetical question but one that required immediate attention. Her delegation welcomed the Commission's engagement and hoped that it would lead to a legally binding document in the very near future.

39. Ukraine and its people had suffered the consequences of a violation of the norms and principles of international law, including international humanitarian law, by a permanent member of the Security Council. Its recent experience had confirmed the damage that could result from an occupying power's failure to give proper consideration to environmental issues in its administration of an occupied territory. Monitoring by Ukraine and by the Organization for Co-operation and Security in Europe had revealed the extent to which environmentally hazardous infrastructure had been damaged or disrupted, agricultural and protected natural areas degraded and environmental governance weakened in Crimea and in the Donbas region.

40. The draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission were a timely contribution to the progressive development of the law in respect of belligerent occupation. The decision to abide by the principles of conservation was correct, but human rights and environmental obligations during prolonged occupations should also be addressed.

41. Her delegation was pleased that draft principle 21 referred to the question of responsibility for environmental damage that extended beyond occupied territories. In the Donbas region, Ukraine faced serious threats from groundwater pollution and subsidence caused by the improper closure and subsequent flooding of coal mines, together with the ongoing risk of a serious environmental emergency due to the irresponsible decision by the occupation authorities to cease groundwater pumping at the YunKom mine — where a nuclear device had been detonated in 1979 — thereby posing the very real risk of radioactive contamination spreading to groundwater, rivers and, ultimately, the Azov Sea.

42. The principles of international law relevant to the environmental hazards that Ukraine had experienced as a result of the unlawful activities in and around occupied Crimea were not limited to international humanitarian law and included, for example, those relating to the United Nations Convention on the Law of the Sea. As a case in point, the illegal construction of a bridge across the Kerch Strait violated the rights of Ukraine as a coastal State, disrupted freedom of international navigation and could have long-term adverse consequences for the coastal and marine environment of the Azov Sea, since the bridge interfered with water circulation, caused increased erosion and damaged internationally important protected areas. Her delegation looked forward to the second report on the topic, in particular the consideration of questions relating to responsibility and liability for environmental harm in relation to armed conflicts.

43. **Mr. Venezis** (Cyprus), referring to the topic of identification of customary international law, said that his delegation reiterated its concerns regarding draft conclusion 15, for two reasons. First, the concept of the persistent objector did not fall within the scope of the Special Rapporteur's mandate. Second, the unconditional acceptance of the persistent objector doctrine opened the door to an *à la carte* approach to rules from which no State could be exempt. His delegation welcomed paragraph 3 of the draft conclusion, in which it was recognized that the draft conclusion was without prejudice to any question concerning peremptory norms of general international

law (*jus cogens*). His delegation did not agree, however, with the assertion that the rule was widely accepted, or that it could have legal effects after the establishment of a customary norm.

44. The Commission's mandate was to determine the methodology for identifying customary international law, not to identify any possible exception to its application. A State or group of States could oppose or diverge from a norm while the latter was in the realm of *lege ferenda* or *statu nascendi*. In such situations, the norm had not yet attained the status of customary international law. When it came to the application of *lege lata*, however, there was no room for a subsequent objector, as that would dilute the norm and was, in any case, beyond the scope of the report.

45. It was true, as one member of the Commission had rightly stated, that there were *obiter dicta* individual opinions of some judges that referred to that issue, but no court had decided that the claim by a State to be a persistent objector prevented the application of a norm of customary international law to that State. However, the concept did not have broad support in State practice and few States invoked it. Its invocation and presumed existence undermined customary international law.

46. In the pending proceedings before the International Court of Justice in *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, States had expressed serious doubts about the existence of the concept. The African Union, representing 55 States, had noted that "it is a trite doctrine that once a rule of customary international law is established that a State cannot unilaterally exempt itself from its obligations under that rule". Cyprus therefore disagreed with the Special Rapporteur's assertion that the persistent objector rule was widely accepted by States; on the contrary, there was a lack of support for the concept either from States or from several members of the Commission. It would therefore be premature to develop a conclusion on a highly controversial topic which had no bearing on the identification of customary international law.

47. At any rate, a State invoking the persistent objector concept must present solid and continuous evidence of its longstanding and constant opposition to the relevant rule in any given case prior to its crystallization. Abstentions were not sufficient for demonstrating objection. Once a norm had been established as customary, a State could not invoke an objection to claim exclusion from its applicability, irrespective of when the objection had first been raised and how persistently. The Special Rapporteur and the Commission should address those matters and not attach to the concept any significance other than the one it could have during the *lege ferenda* phase of the formation of norms of customary international law.

48. The topic of sea-level rise in relation to international law was important not just for small island developing States but for the international community as a whole. Dealing with climate change and its already visible effects was of critical importance to Cyprus, whose coastline was expected to experience serious degradation and seawater intrusion because of rising sea levels. To address those increasingly urgent concerns, Cyprus had adopted a comprehensive national plan in order to implement the commitments undertaken in the Paris Agreement.

49. His delegation was concerned about the method used by the Commission for the topic and its lack of prior consultation with the Sixth Committee. Despite the limited resources at the Commission's disposal, the proposal to create a study group to revisit an issue that had already been addressed in a report by the International Law Association was unnecessary. The work of the Study Group would also overlap with other pre-existing work of the Association, which in 2018 had completed a ten-year study on the effects of rising sea levels on baselines and had since turned its attention to the effects of rising sea levels on statehood and migration. His delegation questioned the wisdom of allocating limited resources to work that was being carried out or had already been completed by another body. The rise in sea levels was already a fact whose negative impact would only grow and whose legal effects would have to be clarified. The best methodology to follow was for the Commission to examine the legal effects of sea-level rise in an inclusive manner on the basis of State practice.

50. In its proposal, the Commission had indicated that the topic would not propose modifications to existing international law, such as the United Nations Convention on the Law of the Sea. To the extent that further study was desired despite the existing work of the International Law Association, his delegation stressed the overriding importance of fully respecting the letter and spirit of the Convention in any such undertaking. Attempts to modify or undermine the Convention would have adverse consequences.

51. In 1973, the Commission had faced significant political difficulties arising from any definition of statehood, which ultimately had prevented it from ever proposing one. The Commission had debated the possibility of defining statehood during the preparatory sessions of the Declaration on Rights and Duties of States in 1949, the Vienna Convention on the Law of

Treaties in 1956 and 1966, and the articles on succession of States in respect of treaties in 1974. Given that the Commission had been unable to agree on a definition of statehood, there was a risk in entrusting it with the task of defining any possible loss of statehood due to rising sea levels.

52. **Mr. Pirez Pérez** (Cuba) said that he would deliver a shortened statement; the full version could be found on the PaperSmart portal. His delegation was concerned about the excessive number of topics in the Commission's programme of work and expressed the need for its documents to be provided in the six official languages of the United Nations.

53. Cuba welcomed the inclusion of the new topics in the long-term programme of work. However, the topic "Universal criminal jurisdiction" failed to meet one of the criteria agreed upon at the Commission's fiftieth session (1998), as it was not at a sufficiently advanced stage in terms of State practice to permit progressive development and codification. The issue required further discussion in the Sixth Committee before the Commission began its work.

54. His delegation appreciated that the topic "General principles of law" had been included in the programme of work, as it constituted a key source of international law mentioned in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

55. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", generally speaking, those means of interpretation could only be properly understood in the context of the set of rules for the interpretation of treaties set out in articles 31 and 32 of the Vienna Convention. Priority must not be given to one means over another, and interpretation must consist of a single combined operation.

56. It was important to respect the rules laid down in the Vienna Convention, which reflected customary practice in the aspects it addressed. At times, draft texts reflected the Vienna Convention, whereas on other occasions terms were incorporated that created ambiguity or inaccuracy in the text. Such draft texts were largely clarified in the commentaries, because if adopted on their own by the General Assembly in a resolution, they might be difficult to interpret.

57. With respect to the topic "Identification of customary international law", his delegation felt that the draft conclusions and commentaries thereto adopted on second reading would provide useful guidance for States and others who used customary international law. Nonetheless, further clarification was needed on the recommendation contained in paragraph 63 (e) of the Commission's report (A/73/10) to follow up the suggestions in the Secretariat memorandum on ways and means of making the evidence of customary international law more readily available (A/CN.4/710).

58. On draft conclusion 2, his delegation agreed that in order to identify a rule of customary international law, there must be a general practice that was accepted as a right or legal obligation by a number of States. State behaviour should only be limited to the practice of the State, as a subject of international law, and should not include the practice of non-State actors, such as non-governmental organizations, transnational corporations, natural persons and non-State armed groups. In that sense, his delegation agreed with draft conclusion 4. In draft conclusion 6 (Forms of practice), the reference to inaction as evidence of State practice was ambiguous.

59. Draft conclusion 8 appeared to be contradictory, because although consistent practice was required, no specific duration was stipulated. However, the time variable could not be divorced from the concept of consistency. His delegation noted that the Commission regarded as State practice the value of States' public positions expressed both in their declarations and in connection with resolutions and topics adopted by an international organization.

60. **Mr. Bai** (Fiji) said that his delegation welcomed the inclusion of the topic of sea-level rise in relation to international law in the Commission's long-term programme of work. Sea-level rise presented difficult legal questions for Fiji and other Pacific island States. The Intergovernmental Panel on Climate Change had projected that the sea level would rise by nearly one metre by 2100, that certain regions were likely to experience sea-level rise sooner and more extensively than others over that period, and that the phenomenon would probably continue beyond 2100.

61. Fiji and other Pacific island States were feeling the impact of sea-level rise first-hand. In response, his Government had initiated national relocation guidelines, in an effort to address the legal challenges that might arise during relocation of communities, which were already experiencing a decline in food production due to saltwater intrusion on agricultural land. According to the World Bank, a one-metre sea-level rise could have far-reaching economic, human and geographical implications and could force some 60 million people in developing countries to abandon their homes in coastal areas.

62. Fiji was concerned that the current international law of the sea failed to address the implications of sea-level rise with regard to the regulation of maritime

entitlements, the delimitation of maritime zones and the right of a coastal State to an extended continental shelf.

63. Under the Convention on the Rights and Duties of States, a State should possess a permanent population; however, coastal communities and low-lying atolls were gradually losing their populations owing to sea-level rise. While international law contemplated the formal dissolution of a State in case of absorption by or merger with another State, it did not provide any guidance as to what happened when a State became uninhabitable and lost its entire population because of sea-level rise. It was not clear whether the State would be considered extinct in international law or would not be so considered unless its entire territory was submerged. In the latter case, it was not apparent how international law covered questions of statehood and the rights and freedoms of the population of a State that became uninhabitable long before its territory physically disappeared.

64. With the adoption of the 2030 Agenda for Sustainable Development, it had been unanimously agreed that no one would be left behind. Fiji and other small island States did not want to be left behind by international law in facing the challenge ahead. His delegation therefore joined the call for the Commission to move the topic of sea-level rise in relation to international law to its current programme of work.

65. **Ms. Katoanga** (Samoa) said that her delegation welcomed the inclusion of the topic of sea-level rise in relation to international law in the Commission's long-term programme of work, as that was an area of major concern to Samoa, given its vulnerability to natural disasters and climate change. Sea-level rise affected its coastal industries, the livelihood of its local communities, and its infrastructure and ecosystems. With 70 per cent of its population residing near the coast within erosion, flooding and landslide zones, Samoa was particularly vulnerable to the effects of climate change. That concern was shared by the Pacific region and had been reflected in the communiqué of the Forty-Ninth Pacific Islands Forum, held in 2018, in which climate change was recognized as the single greatest threat to the livelihood, security and wellbeing of Pacific people. The Government of Samoa emphasized the urgent need for global action on the issue.

66. The Commission had raised valid questions about the legal implications of sea-level rise for baselines and maritime delimitations, statehood and issues relating to the protection of persons affected by the adverse impact of that phenomenon. Samoa strongly supported the Commission's desire to consider those implications. It also joined other Pacific island States in requesting that the Commission move the topic of sea-level rise to its current programme of work, in direct response to the urgency of the topic and the need for the progressive development of international law relating thereto.

67. **Mr. Bae** Jongin (Republic of Korea) said, with regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and the related draft conclusions adopted on second reading, that his delegation endorsed paragraph 3 of draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation). Treaty interpretation should be distinguished from treaty amendment or modification. Any substantial modification made by subsequent agreements or subsequent practice was not governed by articles 31 and 32, but by article 39 of the Vienna Convention.

68. The intention of States parties was the most important part of treaty interpretation. Draft conclusion 13 dealt with the pronouncements of expert treaty bodies on treaty interpretation, but such pronouncements might not qualify as subsequent practice under article 31, paragraph 3 (b), of the Vienna Convention. As the Commission itself had acknowledged, only practice that established agreement among parties regarding treaty interpretation constituted subsequent practice under that provision.

69. His delegation welcomed the adoption on second reading of the draft conclusions on the topic of identification of customary international law and the commentaries thereto, which properly reflected the current state of international law on the topic. However, it had minor concerns about draft conclusions 6 and 10. It was only natural that the form of State practice referred to in draft conclusion 6, paragraph 2, and the evidence of acceptance as law referred to in draft conclusion 10, paragraph 2, overlapped to a considerable degree, since in most cases acceptance as law should be identified through State behaviour or relevant documentation. His delegation reiterated that, to avoid any possible confusion, it might be necessary to seek consistency in the use of terms and in the order in which they were referred to in the two draft conclusions. An explanation might also be needed to clarify discrepancies, where they existed.

70. His delegation welcomed the introduction of the new topic "General principles of law", one of the sources of law mentioned in Article 38, paragraph 1 (c) of the Statute of the International Court of Justice. A clarification of its role and characteristics, with concrete examples, would be useful for both academia and practitioners.

71. The topic "Sea-level rise in relation to international law" included in the Commission's long-term programme of work reflected the serious concerns of small island developing States and was in line with the Commission's recommendation that new topics reflect "new developments in international law and pressing concerns of the international community as a whole". Sea-level rise was an inter-generational issue, and the current generation must accept its obligation to work to establish a legal system to address the problem. In terms of the progressive development of international law, the issue should be dealt with comprehensively from the perspective of *lex ferenda*, and not just *lex lata*. The legal regimes in each area should be considered on an interdisciplinary basis.

72. His delegation had mixed feelings about the topic "Universal criminal jurisdiction". The Republic of Korea had already enacted legislation to implement the Rome Statute of the International Criminal Court and had adopted the principle of universal jurisdiction in a limited sense. An international authoritative guideline would greatly enhance legal understanding and facilitate future application of that principle. His delegation was not sure, however, that the topic was mature enough to give rise to meaningful conclusions. However, it was prepared to keep an open mind and to listen to the opinions of other delegates.

73. **Ms. Mckenna** (Australia) said that her delegation welcomed the adoption on second reading of the draft conclusions and the commentaries thereto on the topics of subsequent agreements and subsequent practice in relation to the interpretation of treaties and of identification of customary international law, which would provide helpful guidance to States, international organizations, courts and legal academics grappling with those complex issues.

74. Australia attached great importance to the topics "Universal criminal jurisdiction" and "Sea-level rise in relation to international law" chosen for inclusion in the Commission's long-term programme of work. In respect of universal criminal jurisdiction, all States had a responsibility to help ensure accountability for the most serious crimes of international concern, namely torture, grave breaches of the 1949 Geneva Conventions and their Additional Protocols, serious violations of international humanitarian law in relation to non-international armed conflicts, crimes against humanity, genocide, slavery and piracy. Accountability was essential for the maintenance of international peace and security. When impunity prevailed, history demonstrated that lasting peace and reconciliation were more difficult to achieve.

75. As a well-established principle of international law, universal jurisdiction was a key component of an effective international criminal justice system, providing a legal basis for prosecuting serious international crimes when the territorial State or the State of nationality was unable or unwilling to do so. It was also a valuable complementary mechanism to international tribunals. Given the importance of the principle and the diversity of State practice regarding its use, the topic would benefit from the Commission's attention. Greater clarity regarding the definition and scope of universal jurisdiction and the parameters for its application would assist States in effectively implementing the principle in a manner that took into account the need to ensure accountability, as well as other relevant considerations.

76. On the topic of sea-level rise in relation to international law, sea-level rise was a significant concern for Australia and its neighbours. The Commission should draw on the substantial practice of the States in the Pacific region and elsewhere which had worked hard to define base points, baselines and outer limits of their maritime zones, consistent with the United Nations Convention on the Law of the Sea; to resolve outstanding maritime delimitations and to make extended continental shelf submissions; and to maximize the stability and clarity that the Convention brought to oceans governance and maritime jurisdiction.

77. Australia also took note of the important work of the International Law Association on aspects of international law related to sea-level rise. Given the urgency of the topic and is potential consequences, Australia strongly supported the Commission, States and regional forums in prioritizing the topic of sea-level rise in relation to international law and urged the Commission to consider the issue expeditiously.

The meeting rose at 4.15 p.m.